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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 463

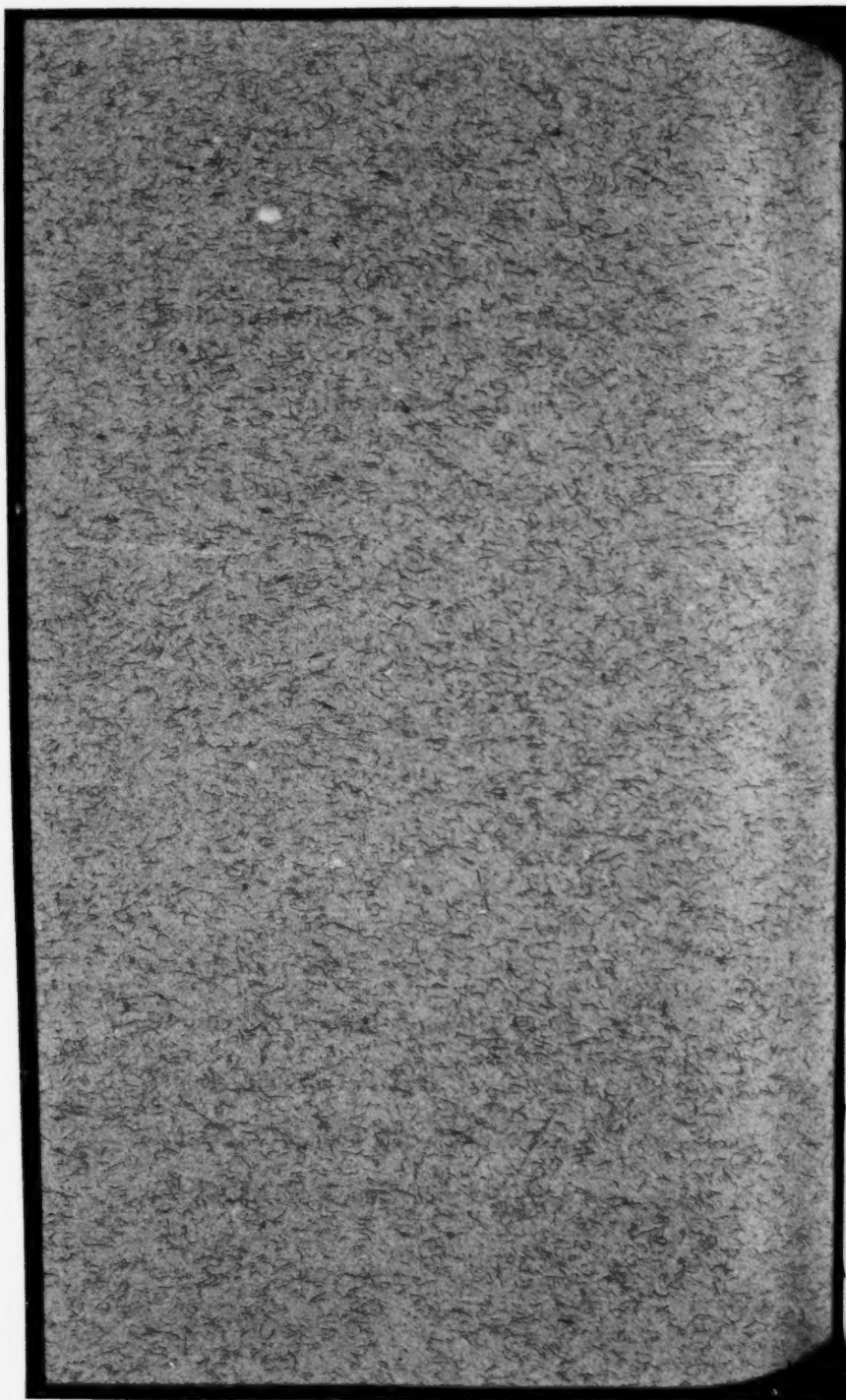
WABASH RAILROAD COMPANY, A CORPORATION,
Petitioner,

vs.

**THE HONORABLE RICHARD M. DUNCAN, A JUDGE
OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF MISSOURI**

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT AND BRIEF IN SUPPORT
THEREOF**

✓
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SAM B. SMITH,**
Counsel for Petitioner.



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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 463

WABASH RAILROAD COMPANY, A CORPORATION,
Petitioner,

vs.

THE HONORABLE RICHARD M. DUNCAN, A JUDGE
OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN
DISTRICT OF MISSOURI

PETITION FOR WRIT OF CERTIORARI

*To the Honorable Chief Justice and Associate Justices
of the Supreme Court of the United States:*

Your petitioner, Wabash Railroad Company, respectfully petitions for a writ of certiorari to review an order of the United States Court of Appeals, Eighth Circuit (Tr. 27), denying your petitioner's petition in that court for a writ of prohibition directed to The Honorable Richard M. Duncan, a Judge of the United States District Court for the Western District of Missouri, in a condemnation proceeding pending in said District Court on removal from the Circuit Court of Carroll County, Missouri, on the ground of diversity of citizenship (Tr. 23). The prohibition pro-

ceeding was brought in said court of appeals to prohibit Judge Duncan from acting in excess of his jurisdiction in that proceeding (Tr. 6). The style of the prohibition proceeding in the Court of Appeals is "Wabash Railroad Company, a corporation, petitioner, vs. The Honorable Richard M. Duncan, a Judge of the United States District Court for the Western District of Missouri, respondent," No. 13814, and the order of said Court of Appeals denying said petition was entered on October 15, 1948. Petition to said court of appeals for rehearing was denied November 5, 1948 (Tr. 34). The Court of Appeals' opinion has not yet been reported (Tr. 22).

I

Summary and Short Statement of Matters Involved

There is pending in the United States District Court for the Western District of Missouri, before The Honorable Richard M. Duncan, a judge thereof, a proceeding for condemnation, in which The State of Missouri, ex rel. Arthur Bultman, George W. Famuliner, Elger Lageman, Roy Dickson, and Joe Kipping, members of the Board of Supervisors of the Sambo Slough Levee District of Carroll County, Missouri, are plaintiffs, and Wabash Railroad Company, a corporation, is defendant, No. 129 Ch. in said district court. The proceeding reached that court on removal from the Circuit Court of Carroll County, Missouri, on the ground of diversity of citizenship (Tr. 23). The Sambo Slough Levee District of Carroll County, Missouri, was organized as a public corporation by decree of the Circuit Court of Carroll County, Missouri, under Article 9, Chapter 41, Revised Statutes of Missouri 1909, now Article 7, Chapter 79, Revised Statutes of Missouri 1939.

The levee district in question, consisting of approximately 8,000 acres, lies north of the Missouri River in Carroll

County, Missouri, and south of the line of the Wabash railroad. The river and the railroad run in an east-west direction. Wakenda Creek flows from west to east, north of the line of the railroad. The creek turns to the southeast and passes under Bridge 516 in the railroad embankment, and discharges into the river, south and east of the levee district. The levee district has constructed a levee along the banks of the river, south of and parallel to the railroad tracks. Drainage District No. 3, north of the railroad, has constructed a levee along the south line of Wakenda Creek. The levees on the north and on the south of the railroad embankment tie into the embankment west of the opening at Bridge 516 and west of an opening at Bridge 518, which is 2.9 miles west of Bridge 516. For the distance of the 2.9 miles, the opening at Bridge 518 is the only opening between the points where the levees on the north and on the south tie into the railroad embankment, and when the levees break, the flood waters flow through the opening at Bridge 518 (Tr. 24).

The object of this condemnation, as shown by the first amended petition (Tr. 16), and the Court of Appeals' opinion (Tr. 23), is to build a ring levee on the south side of the railroad embankment, at Bridge 518, and thus close the only opening in the embankment between the points where the levees tie into the embankment.¹ With the opening at Bridge 518 closed, when the levees on the north or south of the embankment break, there will be no outlet through the embankment between the points at which these levees tie into the embankment for a distance of over two miles. The water will stand against the embankment on whichever

¹ The levee district's petition sought to condemn other portions of petitioner's right of way for other levees; petitioner conceded the right of the levee district to condemn for those levees and granted it that right without compensation, and those levees have been constructed. They do not affect the situation here and are no longer in the condemnation proceeding.

side the levees break. The closing of this opening at Bridge 518 would result in appropriating the use of your petitioner's railroad embankment as a levee for a distance of 2.9 miles. This is not authorized by Section 12519, Revised Statutes of Missouri 1939, under which statute the power of the levee district to condemn land for its statutory purposes is granted.

Section 12519, Revised Statutes of Missouri 1939 (Appendix), provides:

“To construct any and all of said works and improvements (including levees), across, through or over any . . . railroad right of way, track, grade, fill or cut . . . and if need be, condemn any . . . railroad . . . right of way . . . for any of the purposes herein provided.”

The answer of your petitioner to plaintiffs' first amended petition in said condemnation proceeding sets up that said petition does not state a claim on which relief can be granted; a general denial; an allegation that said ring levee would materially interfere with your petitioner in the operation of its railroad; that the construction of said ring levee will close an opening through your petitioner's embankment which now affords an outlet for overflow waters from Wakenda Creek and the Missouri River; and that the construction of said ring levee closing said opening will make a levee of your petitioner's embankment for a distance of approximately two miles (Tr. 71).

On the request of plaintiffs to appoint commissioners in said condemnation proceeding, as provided in said Section 12519, Revised Statutes of Missouri 1939, by reference to Article 2, Chapter 8, Revised Statutes of Missouri 1939 (condemnation proceedings by corporations, Section 1504, *et seq.*), a hearing was had in said district court before Judge Duncan, to determine whether or not commissioners

should be appointed; evidence was heard which established as a fact that the closing of said opening by the construction of said ring levee would make a levee of your petitioner's embankment, on which its main-line track between Kansas City, Missouri, and St. Louis, Missouri, is located, for a distance of over two miles; and the district court, at the close of said hearing, so found, as set forth in Exhibits "A" and "B" (Tr. 10, 11). However, the district court reached the conclusion, as shown by said exhibits, that the board of supervisors of said levee district is entitled to proceed with its condemnation and to have commissioners appointed to assess and determine the amount of damages. The district court, unless prohibited, will appoint such commissioners in the near future, and the ring levee will be constructed closing said opening, which will result in the appropriation of petitioner's railroad embankment for use as a levee for a distance of over two miles.

Section 12519, Revised Statutes of Missouri 1939, gives the levee district the right to condemn a right of way "across, through or over" a railroad right of way, but not "on and along" a structure such as a railroad embankment, to convert it into a levee. It is the contention of your petitioner that the district court, in authorizing the condemnation of the use of your petitioner's railroad embankment as a levee for over two miles, and in threatening to appoint commissioners to assess and determine the amount of damages, is acting in excess of its jurisdiction, and that the United States Court of Appeals, Eighth Circuit, should have prohibited such threatened action.

Your petitioner has no adequate remedy other than to petition this court to issue its writ of certiorari to said court of appeals to the end that the district court shall be prohibited from proceeding further in said condemnation proceeding. Your petitioner has no right of appeal at this stage of the proceeding in the district court. The procedure

to be followed, once the district court has determined the right of condemnation, under Section 12519, Revised Statutes of Missouri 1939, is set out in Section 12519 by reference to the procedure provided by law for the appropriation of land or other property taken by telegraph, telephone, and railroad rights of way (Section 1504, *et seq.*, Revised Statutes of Missouri 1939). Section 1506 (Appendix), provides for the appointment of commissioners to assess and determine the amount of damages; Section 1508 (Appendix), provides that on the commissioners making their report, the levee district has the right to pay the amount assessed by the commissioners to the clerk of the district court, and proceed at once to construct said ring levee. Your petitioner has the right to file exceptions to said commissioners' report and have the matter of damages, only, passed on and assessed by a jury, and on judgment being entered, to appeal from such judgment; but said section also provides that, notwithstanding the filing of such exceptions, and before assessment of damages by a jury, the levee district may proceed to construct said ring levee. Before an appeal can be heard and determined, the levee district has the right to construct the ring levee, and, in order to protect its railroad embankment, your petitioner will have been compelled to raise and strengthen its embankment to make it serve as a levee (a use for which it is not now constructed), at a cost of many thousands of dollars. Even though, on appeal, it should thereafter be determined that the right of condemnation of a railroad embankment lengthwise as a levee does not exist, the harm would have been done and petitioner's right of review would be meaningless and inadequate. If petitioner's construction of Section 12519, Revised Statutes of Missouri 1939, is upheld on appeal, the whole proceeding will fall, the ring levee already constructed will then be removed, the damages assessed and paid by the levee district must be

returned to it, and the money expended by petitioner in raising and strengthening its embankment will be irretrievably lost, with no benefit to the levee district. The right of appeal provided by law would, therefore, serve no purpose. There is not an adequate remedy, and unless this court grants this petition, petitioner will have no adequate right of review and will suffer irreparable injury, and this court's appellate jurisdiction will not be protected.

II

Statement As To Jurisdiction

The jurisdiction of this court is invoked under 28 U. S. C., Sections 1254 and 1651, to review an order of the United States Court of Appeals, Eighth Circuit, denying a writ of prohibition, in *Wabash Railroad Company, a corporation, petitioner, v. The Honorable Richard M. Duncan, a Judge of the United States District Court for the Western District of Missouri, respondent*, No. 13814 in that court.

On October 15, 1948, the United States Court of Appeals, Eighth Circuit, issued the above order and filed its opinion (Tr. 27). On October 29, 1948, and within fifteen days after the issuance of said order, petitioner, as provided by the rules of the United States Court of Appeals, Eighth Circuit, filed in that court its petition for rehearing (Tr. 28), which petition was denied on November 5, 1948 (Tr. 34), and petitioner has exhausted its remedies in that court with respect to its petition for a writ of prohibition.

III

Questions Presented

1. Section 12519, Revised Statutes of Missouri 1939, grants no power to a levee district to appropriate by condemnation a railroad embankment for use lengthwise as a levee. (Here, for a distance of over two miles.)

2. A United States district court, in threatening to proceed with such an appropriation, is clearly acting in excess of its jurisdiction, and the United States Court of Appeals, Eighth Circuit, abused its discretion in not issuing its writ of prohibition to said district court.

(a) The Supreme Court of Missouri, the highest court of that state, has held that where a court is threatening to proceed in a condemnation proceeding beyond the powers of condemnation expressly granted by statute, it is acting in excess of jurisdiction, and not merely committing error.

(b) The proceeding in the United States District Court reached that court on removal from a state court on the ground of diversity of citizenship (Tr. 23). Under the decisions of this court, the jurisdiction of said district court is no wider than that of the state court from which the proceeding was removed, and the decisions of the courts of the state of Missouri with respect to the extent of the jurisdiction of the courts of that state must be followed.

3. Unless the court grants this writ of certiorari and directs the United States Court of Appeals, Eighth Circuit, to issue its writ of prohibition to Judge Duncan, your petitioner is without adequate remedy and will suffer irreparable injury, and the appellate jurisdiction of this court will not be protected.

(a) There is no appeal from the District Court's action at this stage of the proceeding.

(b) An appeal after final decision in the District Court will come too late to afford relief.

4. The Court of Appeals, in declining to issue the writ of prohibition, abused its discretion.

IV

Reasons Relied On for the Issuance of the Writ

1. The opinion of the United States Court of Appeals has decided questions of local law in a way probably in conflict with applicable local decisions.

(a) Section 12519, Revised Statutes of Missouri 1939, gives a levee district only the right to condemn a right of way "across, through or over" a railroad right of way. Your petitioner contended in the District Court and in the Court of Appeals, and the Supreme Court of Missouri held, in *Houck v. Little River Drainage District*, 343 Mo. 28, 119 S. W. 2d 826, l. c. 831, in construing the right of a drainage district to condemn under an almost identical statute, Section 12349 (Appendix), that those words do not mean "on and along." The opinion of the Court of Appeals, in holding that the construction of Section 12519 contended for by your petitioner was doubtful, is in direct conflict with the *Houck* case.

(b) In its opinion, the Court of Appeals held that even if petitioner's construction of Section 12519 is correct, it does not affect the jurisdiction of the District Court, but goes to the merits. This is in direct conflict with *State ex rel. City of St. Louis v. Beck*, 333 Mo. 1118, 63 S. W. 2d 814 and *Peters v. Buckner*, 288 Mo. 618, 223 S. W. 1024, decided by the Supreme Court of Missouri, in which that court held that when a court acts beyond the powers of condemnation granted by statute, it acts in excess of its jurisdiction.

In not following the *Beck* and *Buckner* cases in this case, which was removed to the federal court from a state court on the ground of diversity of citizenship (Tr. 23), the Court of Appeals' opinion is in conflict with *Swift v.*

Phildelphia & R. R. Co., 58 Fed. 858, l. c. 861, and *Lambert Run Coal Co. v. Baltimore & O. R. Co.*, 258 U. S. 377, l. c. 382, 66 L. Ed. 671, which hold that the federal courts, in cases removed on the ground of diversity of citizenship, have no wider jurisdiction than the state courts.

2. Petitioner has no other adequate remedy, and unless this court issues its writ, petitioner will suffer irreparable injury and the appellate jurisdiction of this court will not be protected.

(a) There is no appeal at this stage of the proceeding.

(b) An appeal after final decision in the district court affords no remedy. The Missouri law gives the levee district the right to immediately pay the award of the commissioners and at once construct the ring levee. Petitioner, in the interests of safety, would then be required, before an appeal could be heard, to at once expend large sums of money to convert its railroad embankment into a levee. If, on appeal, Judge Duncan is reversed, the proceeding falls, the amount awarded by the commissioners will be returned, the ring levee will be removed, and petitioner will not be able to recoup the money expended to make the embankment a levee. Thus petitioner may be right in law, but suffer irreparable injury, and this court's right of appellate review will not be protected.

3. Petitioner is entitled to a review of the District Court's construction of Section 12519, Revised Statutes of Missouri 1939. The Court of Appeals declined to construe that statute. For the reasons stated in the foregoing paragraph, the only time that a construction of that statute by an appellate court will have any effect is before commissioners are appointed. Federal procedure contemplates an effective right of review, and if petitioner cannot obtain that right by appeal, it should be able to obtain it through extraordinary remedy.

4. This is the first attempt of a levee district to appropriate a railroad embankment for use lengthwise as a levee, under Section 12519, Revised Statutes of Missouri 1939, and with the growing activities of levee districts, the attempted action here presents a grave situation in the railroad industry and to the general public. Railroad embankments are not constructed to serve as levees. The function of railroads is to safely transport persons and property in the interest of the public, and not to construct levees. The construction of levees is entirely foreign to the purposes for which railroads exist, and the use of their embankments as levees would cast on them unreasonable burdens.

When petition for certiorari is filed in this court, it has the power to make such disposition of the case as justice may at the time require. *Langnes v. Green*, 282 U. S. 531, 536, 75 L. Ed. 520, 524. Since the same questions are here involved in the exercise of the court's discretion to issue its writ of certiorari to the court of appeals and to issue its writ of prohibition to the district court, petitioner asks the court in its discretion to consider this petition and transcript of the record as an alternate request for the issuance by this court of its writ of prohibition directed to the district court.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of this court, directed to the United States Court of Appeals, Eighth Circuit, to the end that the order of that court in the case of Wabash Railroad Company, a corporation, petitioner, vs. The Honorable Richard M. Duncan, a Judge of the United States District Court for the Western District of Missouri, respondent, may be reviewed, and upon such review, the order of said court be reversed and said court be directed to issue its writ of prohibition in said cause, or, in the alterna-

tive, for this court to exercise its discretion and issue its writ of prohibition directed to the District Court, and for such further relief as to this court may seem proper.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 463

WABASH RAILROAD COMPANY, A CORPORATION,
Petitioner,
vs.

THE HONORABLE RICHARD M. DUNCAN, A JUDGE OF
THE UNITED STATES DISTRICT COURT FOR THE WESTERN DIS-
TRICT OF MISSOURI

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

I

Opinion of the Court Below

The opinion of the United States Court of Appeals, Eighth Circuit, on petitioner's petition for writ of prohibition in "Wabash Railroad Company, petitioner, *vs.* The Honorable Richard M. Duncan, a Judge of the United States District Court for the Western District of Missouri, respondent," numbered 13814, has not yet been reported (Tr. 22).

II

Statement of Jurisdiction

The Statement of Jurisdiction under Point II of the petition for writ of certiorari is adopted here for the sake of brevity.

III

Statement of the Case

The Statement under Point I of the petition for writ of certiorari is adopted here for the sake of brevity.

IV

Specification of Errors

The United States Court of Appeals, Eighth Circuit, abused its discretion in not issuing its writ of prohibition, for the following reasons, to wit:

1. Because it has decided important questions of local law, probably in conflict with applicable local decisions:

(a) In failing to prohibit the District Court, in a condemnation case, from proceeding beyond the power of condemnation granted by Section 12519, Revised Statutes of Missouri 1939. *Houck v. Little River Drainage District*, 343 Mo. 28, 119 S. W. 2d 826.

(b) In failing to follow the decisions of the Supreme Court of Missouri as to what constitutes action in excess of jurisdiction by a court in a condemnation proceeding under a Missouri statute. Under applicable decisions of this court, in cases removed to the United States District Court from a state court on the ground of diversity of citizenship, federal courts must follow the decisions of the highest court of the state.

2. Because it declined to construe Section 12519, Revised Statutes of Missouri 1939, although there is no appeal from the action of the District Court at this stage of the proceeding in that court, and a construction of the statute on appeal after final determination of the proceeding in that court will afford petitioner no relief, will not protect the appellate

jurisdiction of this court, and petitioner will have suffered irreparable injury. In such failure, the Court of Appeals has failed to protect the appellate jurisdiction of that court and this Court, and so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision. In Missouri, the highest court of the state determines by prohibition the extent of the lower court's jurisdiction in condemnation cases, where necessary to make its appellate jurisdiction effective.

3. Because, in failing to determine by prohibition the extent of the district court's jurisdiction in a condemnation case, in which an appeal affords no remedy, it has departed from the usual and accepted federal appellate practice, which contemplates an adequate right of review.

Summary of the Argument

I

This Court has the power to issue writs of certiorari to United States Courts of appeal to review the decisions of those courts refusing to issue discretionary writs, such as writs of prohibition, to district courts, even though appeal eventually lies from the district court to the United States Court of Appeals, and not to this Court.

28 U. S. C., Sections 1254 and 1651;

Ex parte Republic of Peru, 318 U. S. 578, 584, *et seq.*,
87 L. Ed. 1014, 1018;

Ex parte U. S., 287 U. S. 241, 248, 77 L. Ed. 283, 286;
McClellan, et al. v. John E. Carland, Judge, 217 U. S.
268, 54 L. Ed. 762;

Ex parte Cooper, 138 U. S. 404, 34 L. Ed. 993;

Ex parte Fahey, 332 U. S. 258, 91 L. Ed. 2041.

II

Section 12519, Revised Statutes of Missouri 1939, only gives levee districts the right to condemn rights of way "across, through or over" railroad rights of way for the purpose of constructing levees, and does not give them the power to appropriate structures such as railroad embankments, lengthwise, for use as levees.

(a) In *Houck v. Little River Drainage District*, 343 Mo. 28, 119 S. W. 2d 826, the Supreme Court of Missouri, in construing the right of a drainage district to condemn a right of way for a levee, under an almost identical statute, held that the words "across, through or over" do not mean "on and along."

(b) A railroad is not required by law to construct or maintain its embankment as a levee. It could tear out the embankment which the levee district seeks to appropriate as a levee, and build a trestle over the entire distance of 2.9 miles.

Vollrath v. Wabash R. Co., 65 Fed. Supp. 766, 772;

Geisert v. C. R. I. & P. R. Co., 226 Mo. App. 121, 42 S. W. 2d 954, 957.

(c) Sec. 5222, R. S. Mo. 1939, requires railroads to construct openings through their embankments, such as the opening sought to be closed here, to drain and carry off waters, including surface waters. A construction of Sec. 12519 which permits a levee district to appropriate an embankment lengthwise as a levee, would nullify Section 5222.

(d) Section 12519 gives the levee district the right to condemn land for the purpose of constructing levees, and not to appropriate structures to serve as levees. The closing of the opening at Bridge 518, which makes the embankment a levee for a distance of over two miles, is a "taking" of

the use of the embankment lengthwise as a levee, as much as if the petition of the levee district expressly sought to condemn the use of the embankment for that purpose.

Southern R. Co. v. Virginia, ex rel. Shirley, 290 U. S. 190, 78 L. Ed. 260.

(e) It is extremely important to the railroad industry and to the general public that railroad embankments should not be condemned for use lengthwise as levees.

III

The United States District Court should have been prohibited by the United States Court of Appeals from proceeding beyond the power of condemnation granted in Section 12519, because in so proceeding, the district court would exceed its jurisdiction and would not be merely committing error. The Supreme Court of Missouri has held that when a court in a condemnation proceeding under a Missouri statute goes beyond the power granted by the statute, it is exceeding its jurisdiction.

State ex rel. City of St. Louis v. Beck, J., 333 Mo. 1118, 63 S. W. 2d 814;

Peters v. Buckner, 288 Mo. 618, 232 S. W. 1024.

And this court has held that the courts of the United States, in cases removed to them on the ground of diversity of citizenship, have no wider jurisdiction than have the courts of the state from which they were removed.

Lambert Run Coal Co. v. B. & O. R. Co., 258 U. S. 377, 66 L. Ed. 671;

Swift v. Philadelphia & R. R. Co., 58 Fed. 858, 861.

IV

Unless this court issues its writ, petitioner will have no adequate remedy, this court's appellate jurisdiction will not be protected, and petitioner will suffer irreparable injury.

(a) There is no appeal from the district court at this stage of the proceedings in that court.

28 U. S. C. 1292;

Catlin v. U. S., 324 U. S. 229, 89 L. Ed. 911;

Dieckmann v. U. S., 88 F. 2d 902;

St. Joseph Term. R. Co. v. Hannibal & St. Joe R. Co.,
94 Mo. 535, 6 S. W. 691.

(b) An appeal, after final determination in the district court, will constitute no remedy where the jurisdiction of that court is in question in a proceeding under the Missouri condemnation statutes.

ARGUMENT

I

This court has power to issue writs of certiorari to United States courts of appeal to review the decisions of those courts in refusing to issue discretionary writs to district courts.

That this court has the power to issue writs of certiorari to United States courts of appeal cannot be questioned.

28 U. S. C., Sec. 1254, 1651;

Ex parte Cooper, 138 U. S. 404, 34 L. Ed. 993;

Ex parte John H. Fahey, 332 U. S. 258, 91 L. Ed. 2041.

It makes no difference that the right of appeal after final judgment in the district court is to the United States Court of Appeals, Eighth Circuit, and not to this court.

Ex parte Republic of Peru, 318 U. S. 578, 584, et seq., 87 L. Ed. 1014, 1018;

Ex parte U. S., 287 U. S. 241, 248, 77 L. Ed. 283, 286.

Also, the writ can be issued by this court to review the action of the Court of Appeals in denying discretionary writs, such as the writ of prohibition.

McClellan et al. v. John E. Carland, Judge, 217 U. S. 268, 54 L. Ed. 762.

II

Sec. 12519, R. S. Mo. 1939, only gives a levee district the right to condemn a right of way "across, through or over" a railroad right of way, and not to condemn the use of a structure such as railroad embankment as a levee for a distance of approximately two miles.

No power is given the levee district under the Missouri circuit court levee district law to condemn the use of a railroad embankment for a levee for a distance of two miles. Section 12519, Revised Statutes of Missouri 1939 (Appendix), gives the levee district the power "to construct any and all of said works and improvements (including levees) across, through or over any . . . railroad right of way, track, grade, fill or cut . . . and if need be condemn any . . . railroad . . . right of way . . . for any of the purposes herein provided." This statute limits the levee district's right to condemn a levee right of way "across, through or over" the railroad right of way, but does not empower it to appropriate a railroad embankment lengthwise for a levee.

(a) The case of *Houck v. Little River Drainage District*, 343 Mo. 28, 119 S. W. 2d 826, in construing the right of condemnation under the Missouri drainage district law, Section 12349, Revised Statutes of Missouri 1939 (Appendix), which is substantially the same as Section 12519 (the levee district law), decides two questions that are here involved: First, that the right to construct a levee "across, through or over" does not mean "on and along"; and second, that the right to condemn for a right of way is limited to land. No power is given to condemn structures. In so deciding, the court, on page 831, said:

"Statutes conferring the power of eminent domain must be strictly construed. *State ex rel. Cranfill v. Smith*, 330 Mo. 252, 48 S. W. 2d 891, 81 A. L. R. 1066, and cases cited. Under the strictissimi rule, Sec. 5513, R. S. 1909, could not reasonably be construed to mean that any interest in any land passed, upon condemnation by defendant of the right of way of Ramsey Creek Diversion channel and levee, except said land (see Sec. 5513, R. S. 1909, *supra*), that is the right of way. Able counsel do not call our attention to any case and we find no case supporting the contention that by acquiring the right of way by condemnation of Ramsey Creek Diversion channel and levee, defendant thereby acquired the right to superimpose upon the adjacent rockroad easement an additional public servitude, and we rule that defendant acquired no such right. And when defendant placed its setback levee upon the right of way of the rockroad there was superimposed 'an additional public servitude upon a part of (plaintiff's) soil on which the original public highway (rockroad) rested.' *State ex rel. Gagnepain v. Daues et al.*, 322 Mo. 376, 15 S. W. 2d 815, *loc. cit.* 818; *State ex rel. McWilliams v. Little River Drainage District*, 269 Mo. 444, *loc. cit.* 457, 190 S. W. 897.

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“That the rockroad right of way, for about one-half mile across plaintiff's land has been converted by defendant to a use other than a public road is conceded. The right of defendant under Sec. 10768, *supra*, ‘to construct (without paying therefor, as was held in the McWilliams and Caruthers cases, *supra*) any and all of said works and improvements *across, through or over any public highway*’ does not mean the right to construct (with immunity) on and along such highway so as to change a substantial part of it to a use wholly incompatible to that of a public highway. And especially should this be so when private rights are involved as here. Defendant contends that what is said in the McWilliams and Caruthers cases as to incompatible use and trenching upon private rights is dictum, but if it be such, it is sound and sensible and we adopt it as the law.” (Emphasis ours.)

Thus the highest court of the state of Missouri has construed the same language as involved in Section 12519. The Court of Appeals abused its discretion in not following that decision.

(b) It is also significant, in construing Section 12519, that a railroad is not required by law to construct or maintain its embankment as a levee. It could tear out the embankment which the levee district here seeks to appropriate as a levee, and build a trestle over the entire distance of approximately two miles.

Vollrath v. Wabash R. Co., 65 F. Supp. 766, 772;

Geisert v. C. R. I. & P. R. Co., 226 Mo. App. 121, 42 S. W. 2d 954, 1. c. 957.

(c) Section 5222, Revised Statutes of Missouri 1939, should be considered in construing Section 12519, because Section 5222 requires a railroad to cause to be constructed and maintained suitable openings across and through its right of way to afford sufficient outlet to drain and carry off

waters, including surface waters. About two sections of land north of the railroad embankment are closed between levees and the railroad embankment, with Bridge 518 the only opening. Judge Duncan, in Exhibit "B" (Tr. 11) found as a fact "that said levee will close an opening through defendant's embankment which affords an outlet for the overflow waters of Wakenda Creek." It seems unreasonable that a levee district, for the benefit of landowners on one side of a railroad embankment, could close an opening through the embankment and make the embankment a levee for a distance of over two miles, which opening the railroad is required to maintain, under the above statute, for the benefit of landowners on the other side of the embankment. Section 12519, Revised Statutes of Missouri 1939, thus clearly did not contemplate the appropriation of a railroad embankment as a levee for a distance of over two miles, by closing an opening which the railroad was required to maintain, under Section 5222.

(d) It will also be noted that the right to condemn a right of way for levee purposes, under Section 12519, is for the purpose of *constructing* levees. The "taking" of a railroad embankment for a levee for over two miles is not the condemnation of a right of way for the purpose of constructing a levee. It is the appropriation of a structure for use as a levee, and no such power is given under the statute. The levee district is seeking to do indirectly that which it could not do directly. The result of the condemnation here is as much a "taking" of the use of petitioner's embankment for a levee as if the levee district had sought to do so directly.

Southern R. Co. v. Virginia ex rel. Shirley, 290 U. S. 190, 78 L. Ed. 260.

(c) Judge Duncan's finding that the appropriation of petitioner's right of way and embankment *lengthwise* for a levee will not materially interfere with the operation of the railroad is beyond his jurisdiction and is immaterial. It is immaterial because, if the power to condemn a railroad right of way *lengthwise* is not given by the statute, it can make no difference if such appropriation would or would not interfere with operation of the railroad. The question here comes down to one of jurisdiction. Judge Duncan had no jurisdiction to pass upon what constitutes material interference with the railroad in a case in which the levee district seeks to appropriate the railroad right of way *lengthwise* and not "across, through or over." The only right of a levee district to condemn a railroad right of way is found in Section 12519, which authorizes levee districts to condemn rights "across, through or over" railroad rights of way. Those words establish and confine the jurisdiction of the condemnation court. The law of Missouri strictly restricts the right to superimpose a public use on land already subject to another public use, to purposes specifically authorized by statute. The public policy of Missouri is expressed in this case in Section 12519, which limits a levee district to the right to condemn "across, through or over" a railroad right of way. Had the Legislature intended to confer on a levee district the power to condemn a railroad right of way and embankment thereon *lengthwise* for a levee, then the Legislature would undoubtedly have so provided in the statute. In the absence of an authorization in the statute to condemn *lengthwise*, the condemnor cannot sustain a right to so condemn, and the court is powerless to render a judgment of condemnation for a right of way *lengthwise*. Because Judge Duncan cannot have jurisdiction to determine any fact or proceed with the condemna-

tion, where the condemnor seeks to appropriate property, contrary to the express authorization of the statute, he cannot have power in this case to determine any fact or entertain any suit for condemnation which is not founded upon a proceeding to condemn "across, through or over" the railroad right of way.

(f) This is the first attempt by a levee district, proceeding under Section 12519, to appropriate a railroad embankment lengthwise for a levee, and with the growing activities of levee districts, this attempted action presents a grave situation to the railroad industry and the general public. Railroad embankments as now constructed are somewhat porous in order to provide for the drainage of water that falls on them and to cushion the shock caused by the operation of heavy trains. The safety of this construction, and the height to which railroad embankments are built, is, according to sound railroad engineering experience, dependent upon openings such as the one in controversy here to equalize flood waters on both sides of the embankment. It is the function of railroad companies to safely transport persons and property in the interests of the public and not to build levees. That is the function of levee districts and is entirely foreign to the purposes for which railroads exist, and casts upon them an unreasonable burden.

We submit that no power is given under Section 12519 that permits a levee district to appropriate the use of a railroad embankment for a levee for a distance of over two miles; and that the District Court, in permitting such appropriation, is exceeding its jurisdiction, and the Court of Appeals abused its discretion in not issuing its writ of prohibition.

III

To proceed in this cause, the district court would exceed its jurisdiction, and should have been prohibited by the Court of Appeals.

The Court of Appeals, in its opinion (Tr. 26), held that the question of the right of the levee district does not affect the jurisdiction of the court but goes to the merits, and that the jurisdiction of the court is not involved. This is in direct conflict with the decisions of the Supreme Court of Missouri.

In the case of *State ex rel. City of St. Louis v. Beck, J.*, 333 Mo. 1118, 63 S. W. 2d 814, the trial court, after appointing commissioners in a condemnation proceeding, was about to give the commissioners an erroneous instruction on damages. A petition for writ of prohibition was filed in the Supreme Court of Missouri, and that court, in granting the writ, said:

“If a court is about to give to its commissioners an erroneous instruction in regard to the damages of the property affected, prohibition is the proper remedy to prevent the trial court from acting in excess of its jurisdiction.”

In *Peters v. Buckner*, 288 Mo. 618, 232 S. W. 1024, the Circuit Court of Jackson County, Missouri, in a condemnation proceeding, appointed commissioners and gave an erroneous instruction as to damages. A writ of prohibition was applied for, and granted by the Supreme Court of Missouri. In its opinion, the Supreme Court of Missouri considered the question of whether the giving of such an instruction was in excess of the trial court's jurisdiction, or merely error, and reached the conclusion that it was in excess of its jurisdiction.

In the cases cited above, the trial court in each instance had general jurisdiction over the condemnation proceeding, but in each case, when the court was about to take some action not authorized by the condemnation statute, it was held to be exceeding its jurisdiction, and a writ of prohibition was issued.

The jurisdiction of federal courts in cases removed thereto on the ground of diversity of citizenship, when construing the powers granted by a state statute, is limited to the jurisdiction that a state court can exercise. In *Swift v. Philadelphia R. R. Co.*, 58 Fed. 858, the court said, on page 861:

“The courts of the United States, upon removed cases, have no wider jurisdiction than have the courts of the state from which they were removed. The removal simply transfers the hearing from the state court to the national tribunal, but does not enlarge the right of the court to hear the cause. The right to question the reasonableness of an interstate commerce rate is a matter of primary, as well as exclusive, jurisdiction in the federal courts. It does not reside in the jurisdiction of the state courts, or of the federal courts, acquired by the fact of diverse citizenship.”

And in *Lambert Run Coal Co. v. Baltimore & O. R. Co.*, 258 U. S. 377, 66 L. Ed. 671, the court, on page 382 (official reporter), states:

“As the state court was without jurisdiction over either the subject-matter or the United States, the district court could not acquire jurisdiction over them by the removal. The jurisdiction of the Federal court on removal is, in a limited sense, a derivative jurisdiction. If the state court lacks jurisdiction of the subject-matter or of the parties, the Federal court acquires none, although it might in a like suit, originally brought there, have had jurisdiction.”

Since the Supreme Court of Missouri, in the *Beck* and *Buckner* cases above mentioned, held that when a court, in a condemnation proceeding under a Missouri statute, goes beyond the power granted by the statute, it is exceeding its jurisdiction, then here the question of whether Judge Duncan's conclusion to appoint commissioners is one of excess of jurisdiction or of error, must be resolved as a question of excess of jurisdiction.

IV

Applicant has no right to appeal from the action of the District Court at this stage of the proceedings, and has no adequate remedy unless this Court issues its writ of certiorari to protect its appellate jurisdiction and to prevent irreparable injury.

Your applicant has no adequate remedy other than to petition this court to issue its writ of certiorari. Condemnation proceedings in Missouri are different from other proceedings. After the right of condemnation has been determined under Section 12519, Revised Statutes of Missouri 1939, that section provides that the procedure to be followed is that "provided by law for the appropriation of land or other property taken for telegraph, telephone and railroad rights of way." This procedure is set forth in Sections 1506 and 1508, Revised Statutes of Missouri 1939 (Appendix). The procedure there provided is that commissioners are appointed to assess and determine the amount of damages; the commissioners make their award, and when they do so, the levee district may at once pay the award to the clerk of the court and construct its ring levee, even though petitioner files exceptions to the award. The railroad embankment for a distance of over two miles must

then function as a levee, and to protect the embankment to meet that use, petitioner must incur the expenditure of many thousands of dollars to raise and strengthen its embankment, all before the condemnation proceedings can be reviewed on appeal. If on appeal the appellate court upholds petitioner's construction of Section 12519, the whole proceeding falls; the award of the commissioners becomes void; the damages awarded petitioner must be returned; the ring levee must be removed; and thus the levee district will have enjoyed no benefit, but petitioner's expenditures to meet the conditions caused by the construction of the ring levee will be irretrievably lost. Thus an appeal at the end of the proceeding affords no remedy.

Nor is the matter of irreparable injury conjectural, as the Court of Appeals states in its opinion. It is true no one can say what award the commissioners will make, but it is immaterial whether the award be One Dollar or a Hundred Thousand Dollars, because if, on appeal, this court should uphold petitioner's construction of the statute here urged, the whole proceeding would fall and the irretrievable loss to petitioner would be sustained, with no benefit to the levee district.

It is no answer to say that the levee district may abandon the proceedings by not paying the award of the commissioners, or to say that it might pay the award but not proceed at once to construct the ring levee. Under the law, the levee district has the right to at once pay the award and immediately thereafter construct the levee, and petitioner is powerless to stop it. If Section 12519 is not construed by this court in passing on this writ, petitioner is deprived of its right of effective review by this court, and its expenditures irretrievably lost, even though its construction of

Section 12519 may be upheld on appeal. The only time when a construction of Section 12519 by this court will give any relief is before the commissioners' award is made and paid. Unless this court acts now, its effective right of review will not be protected,

In prohibition cases, it has been said by the courts that if the right to the writ is doubtful, it should be denied. In none of the cases that we have seen, however, has that rule been applied to condemnation cases, where the party whose property is taken must at once incur great expenditures, which cannot be recovered if the right to condemn is denied on appeal. The reason why it should not be applied in such cases is that the only time that a construction by an appellate court of the statute granting the power of condemnation can afford relief, and protect the appellate jurisdiction of the appellate court, is when the appellate court determines whether or not its writ of prohibition should issue. We believe we have demonstrated why that is true, in the preceding pages.

That there is no appeal at this stage of the proceeding is clear. Under Rule 81(a)(7), Rules of Civil Procedure for the District Courts of the United States, it is provided that the rules are not applicable in proceedings for condemnation of property under the power of eminent domain, except as to appeals. Therefore, the Missouri procedure as above set out must be followed in this proceeding, but the determination of what orders are appealable is based on the Judicial Code. 28 U. S. C., Section 1292, makes no provision for an appeal from an interlocutory order determining the right to condemn and the appointment of commissioners.

In *Catlin v. U. S.*, 324 U. S. 229, 89 L. Ed. 911, on writ of certiorari to the United States Circuit Court of Appeals, this court referred to Judicial Code Sections 128 and 129,

28 U. S. C. A. 225, 227, now consolidated in 28 U. S. C., Section 1292, and held that the Circuit Court of Appeals correctly determined that an order of the District Court denying a motion to dismiss a condemnation petition, on the ground that the taking was for unauthorized purposes, was not appealable.

In *Dieckmann v. U. S.*, 88 F. 2d 902, the court held that the district court's order overruling landowners' objections to the complaint and to the appointing of appraisers in a condemnation proceeding was not appealable.

Under Missouri procedure, there is no right of appeal until final judgment. *St. Joe Term. R. Co. v. Hannibal & St. Joe R. Co.*, 94 Mo. 535, 6 S.W. 691.

Federal procedure contemplates a right of adequate appellate review. Since your applicant has no appeal at this stage of the proceeding, and since, after the construction of the ring levee, your petitioner will be required to expend thousands of dollars to convert its embankment into a levee in order to protect the embankment and the trains operating over it, and since, if on appeal the court should hold that this proceeding is unauthorized, the ring levee could then be removed and the labor and money expended by your applicant to protect its embankment would have been for naught, and petitioner could recover no part of the money expended nor could it collect the amount assessed by the jury. Therefore, we urge that an appeal is not an adequate remedy and that this court, to protect its adequate right of review, should issue its writ of certiorari to the Court of Appeals, to the end that the court may effectively pass on the question of whether a levee district has the power, under Section 12519, Revised Statutes of Missouri 1939, to appropriate a railroad embankment, for a distance of approximately two miles, for a levee, or, in the alternative,

exercise its own discretion and issue its writ of prohibition direct to the District Court. Otherwise, your applicant may be right in law and yet suffer irreparable injury.

Respectfully submitted,

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APPENDIX**CONSTITUTION OF MISSOURI 1875****Article 2, Section 21.**

“That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury, or board of commissioners of not less than three freeholders, in such manner as may be prescribed by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad tracks without consent of the owner thereof shall remain in such owner, subject to the use for which it is taken.”

CONSTITUTION OF MISSOURI 1945**Article 1, Section 26.**

“That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad purposes without consent of the owner thereof shall remain in such owner subject to the use for which it is taken”.

Section 12519, Revised Statutes of Missouri 1939:

“In order to effect the leveeing, protection and reclamation of the land and other property in the district subject to tax, the board of supervisors is authorized and empowered to straighten, widen, change the course and line of any levee in or out of said district; to fill up any creek, drain, channel, river, watercourse or natural stream; and to divert or divide the flow of water in or out of said

district; to construct and maintain sewers, levees, dikes, dams, sluices, revetments, drainage ditches, pumping stations, syphons and any other works and improvements deemed necessary to preserve and maintain the works in or out of said district; to construct roadways over levees and embankments; to construct any and all of said works and improvements across, through or over any public highway, railroad right-of-way, track, grade, fill or cut in or out of said district; to remove any fence, building or other improvements in or out of said district, and shall have the right to hold, control and acquire by donation or purchase, and if need be, condemn any land, easement, railroad or other right-of-way, sluice or franchise in or out of said district for right-of-way, or for any of the purposes herein provided, or for material to be used in constructing and maintaining said works and improvements for leveeing, protecting and reclaiming the lands in said district. Said board shall also have the right to condemn for the use of the district, any land or property within or without said district not acquired or condemned by the court on the report of the commissioners assessing benefits and damages and shall follow the procedure that is now provided by law for the appropriation of land or other property taken for telegraph, telephone and railroad rights of way.

Section 1506, Revised Statutes of Missouri 1939.

APPOINTMENT OF COMMISSIONERS—DUTIES OF

The court, or judge thereof in vacation, on being satisfied that due notice of the pendency of the petition has been given, shall appoint three disinterested commissioners, who shall be freeholders, resident of the county in which the real estate or a part thereof is situated, to assess the damages which the owners may severally sustain by reason of such appropriation, who, after having viewed the property, shall forthwith return, under oath, such assessment of damages to the clerk of such court, setting forth the amount of damages; and should more than one owner be included in the petition, then the dam-

ages allowed each shall be stated separately, together with a specific description of the property for which such damages are assessed, and the clerk shall file said report and record the same in the order book of the court; and thereupon such company shall pay to the said clerk the amount thus assessed, for the party in whose favor such damages have been assessed; and on making such payment it shall be lawful for such company to hold the interest in the property so appropriated for the uses aforesaid; and upon failure to pay the assessment aforesaid, the court may, upon motion and notice by the party entitled to such damages, enforce the payment of the same by execution, unless the said company shall, within ten days from the return of such assessment, elect to abandon the proposed appropriation of any parcel of land, by an instrument in writing to that effect, to be filed with the clerk of said court, and entered on the minutes of the court, and as to so much as is thus abandoned the assessment of damages shall be void. (R. S. 1929, Para. 1342)

Section 1508, Revised Statutes of Missouri 1939.

CLERK TO GIVE NOTICE OF THE FILING OF THE REPORT—REPORT MAY BE REVIEWED, WHEN

Upon the filing of such report of said commissioners, the clerk of the court wherein the same is filed shall duly notify the party whose property is affected of the filing thereof; and the report of said commissioners may be reviewed by the court in which the proceedings are had, on written exceptions, filed by either party in the clerk's office, within ten days after the service of the notice aforesaid; and the court shall make such order therein as right and justice may require, and may order a new appraisal, upon good cause shown. Such new appraisal shall, at the request of either party, be made by a jury, under the supervision of the court, as in ordinary cases of inquiry of damages; but notwithstanding such exceptions, such company may proceed to erect said telephone or telegraph line, or construct said road or railroad; and any subsequent proceedings shall only affect the amount

of compensation to be allowed. In all cases arising under the provisions of this article, the report of commissioners, when signed by a majority of them, shall be taken and considered as the report of all. (R. S. 1929 Par. 1344.)

Section 5222, Revised Statutes of Missouri 1939.

"It shall be the duty of every corporation, company or person owning or operating any railroad or branch thereof in this state, and of any corporation, company or person constructing any railroad in this state, within three months after the completion of the same through any county in this state, to cause to be constructed and maintained suitable openings across and through the right of way and roadbed of such railroad, and suitable ditches and drains along each side of the roadbed of such railroad, to connect with ditches, drains or watercourses, so as to afford sufficient outlet to drain and carry off the water, including surface water, along such railroad whenever the draining of such water has been obstructed or rendered necessary by the construction of such railroad; . . ."

Section 12349, Revised Statutes of Missouri 1939.

"In order to effect the drainage, protection and reclamation of the land and other property in the district subject to tax the board of supervisors is authorized and empowered to clean out, straighten, widen, change the course and flow, alter or deepen any ditch, drain, river, watercourse, pond, lake, creek, bayou or natural stream in or out of said district; to fill up any creek, drain, channel, river, watercourse or natural stream; and to concentrate, divert or divide the flow of water in or out of said district; to construct and maintain main and lateral ditches, canals, levees, dikes, dams, sluices, revetments, reservoirs, holding basins, floodways, pumping stations and syphons and any other works and improvements deemed necessary to preserve and maintain the works in or out of said district; to construct or enlarge or cause to be constructed or enlarged any and all bridges that may be needed in or out of said district across any drain, ditch, canal, floodway, holding basin, excavation, public highway, railroad right of way, tract, grade, fill or cut; to construct

roadways over levees and embankments; to construct any and all of said works and improvements across, through or over any public highway, railroad right of way, track, grade, fill or cut in or out of said district; to remove any fence, building or other improvements in or out of said district, and shall have the right to hold, control and acquire by donation or purchase, and if need be condemn any land, easement, railroad right of way, sluice, reservoir, holding basin or franchise in or out of said district for right of way, holding basin or for any of the purposes herein provided, or for material to be used in constructing and maintaining said works and improvements for draining, protecting and reclaiming the lands in said district. Said board of supervisors shall also have the power and authority to hold and control all water power created by the construction of works of said district, and shall have power to construct and maintain hydro-electric power plant or plants for the purpose of developing such power for the use of said district, and to use any funds in the treasury of said district not otherwise appropriated for the construction and maintenance of such power plant or plants, and the said board of supervisors shall have the right and authority to lease any surplus power in excess of that required for the uses of said district, and the proceeds of such lease or leases shall be converted into the treasury of said district. Said board shall also have the right to condemn for the use of the district, any land or property within or without said district not acquired or condemned by the court on the report of the commissioners assessing benefits and damages and shall follow the procedure that is now provided by law for the appropriation of land or other property taken for telegraph, telephone and railroad rights of way."